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Supreme Court of the United States

OCTOBER TERM, 1954

No. 473

GULF OIL CORPORATION,

Appellant,

—against—

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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No. 473

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No.

GULF OIL CORPORATION,

Appellant,

—against—

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Introduction

Appellant appeals from the judgment of the Court of Appeals of the State of New York entered on July 14, 1954, sustaining the validity, under the United States Constitution, of the business privilege tax laws of the City of New York if and when applied so as to tax, on a so-called "fairly apportioned" basis, the gross receipts from segregated interstate sales of goods sold for shipment and shipped from New York City to purchasers in other states pursuant to sales contracts and orders solicited and serviced in the states of destination, which said laws expressly imposed the tax as one for the privilege of engaging in the business of making such interstate sales.

Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York is annexed hereto as Appendix A. It is dated July 14, 1954 and is reported in 307 N. Y. 342, 121 N. E. (2d) 360 (advance sheets).

A copy of appellant's notice of motion in the Court of Appeals to amend the remittitur of said Court, which came on to be heard on October 18, 1954, but which was denied on December 2, 1954, and appellant's affidavit in support of said motion are annexed hereto as Appendix B.

The opinion of the Appellate Division of the Supreme Court of New York, dated February 16, 1954, which was reviewed and reversed by the Court of Appeals is annexed hereto as Appendix C. It is reported in 283 App. Div. 309, 127 N. Y. S. (2d) 684.

Jurisdiction

(a) In General

The judgment of the Court of Appeals was entered on July 14, 1954. On October 11, 1954 notice of appeal to this Court was served upon the appellee and filed in the Supreme Court of the State of New York, New York County, the Court now possessed of the record herein.

The jurisdiction of this Court to review said judgment is conferred by Title 28, United States Code, Section 1257 (2).

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(b) The Judgment, Though It Appears Not To Be Final On Its Face, Is, On the Record Herein, a Final Judgment For the Purposes of This Appeal.

The motion of appellant to amend the remittitur of the Court of Appeals, attached hereto as Appendix B, the accompanying copies of appellant's brief in the Court of Appeals, and the accompanying copies of the record on appeal are submitted in order to demonstrate that there was duly drawn in question in that Court the validity of the gross receipts privilege tax laws of the City of New York (Administrative Code, Chapter 41, Title RR, and Chapter 46, Title B) as applied to appellant's interstate sales gross receipts herein described, on the ground of their being repugnant to the Commerce and Due Process Clauses of the Constitution of the United States for the reasons stated with particularity herein and in said motion. Said motion and the other papers mentioned, when read with the opinion of the Court of Appeals, make it clear that the decision of the Court of Appeals was in favor of the validity of such tax laws, provided, as that Court stated, a "fair apportionment" of such interstate sales gross receipts to New York City is made the basis of the tax. Such decision, the said motion and other papers show, was material and necessary to the determination of the issues by the Court of Appeals. Its decision in favor of the validity of said tax laws when so applied is final as far as the Court of Appeals is concerned. It has now become the law of this case.

There is now incorporated in the record by order of the Supreme Court of the State of New York a formal and binding commitment and undertaking by the appellant (as part of Appendix B hereof) to the effect that in the event this Court takes jurisdiction of and entertains this appeal and affirms the judgment of the Court of Appeals on the merits of the federal questions that were presented to and decided by that Court and are being presented to this

Court, then the appellant will not take or attempt to take any further appeal to this Court in this cause, regardless of the disposition hereafter made of any federal or non-federal question or questions that may be presented or that may arise in any subsequent court or administrative proceeding relating to this cause. Such a commitment is not a matter that is foreign to appeal procedure. It has a close parallel in the practice in New York embodied in the provision that an appeal to the Court of Appeals from a non-final order, such as an order granting a new trial or hearing, lies, as a matter of right, where the appellant stipulates that, upon affirmance, judgment absolute shall be rendered against him (Civil Practice Act of New York, § 588, subdivision 3; Constitution of the State of New York, Article VI, Judiciary, § 7, Jurisdiction of Court of Appeals, subdivision (3)).

The opinion of the Supreme Court of the State of New York accompanying its order to incorporate said commitment in the record on appeal (see Appendix B) states:

> "It seems to the court utterly reasonable that the plaintiff be entitled to seek the proposed review by the United States Supreme Court and that such review be implemented by the relief in the manner here sought."

On the record herein as it now stands all federal questions that can ever be presented to this Court in this cause are now ripe for adjudication and are being presented to this Court on this appeal.

The policy of 28 U. S. C. § 1257 (2) against fragmentary review, premature constitutional adjudications, and advisory opinions by this Court will not be offended if this Court takes jurisdiction of this appeal, and, on plenary consideration of briefs on the merits and oral argument, decides this case on the merits of the federal questions herein presented. There will be no matters left open that

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can possibly generate additional federal questions upon which a later appeal herein to this Court can be sought. There can be no unresolved contingencies of any subsequent litigation herein which can be the subject of further exercise of the appellate jurisdiction of this Court. *Republic Natural Gas Co.* v. *Oklahoma* (1948), 334 U. S. 62.

A decision by this Court on the questions so presented will settle every substantial pending phase of this controversy. As shown below, it is to the interest not only of the parties and the courts of the State of New York but also of thousands of other affected taxpayers that the respective rights involved be determined and that the controversy regarding the specific federal questions presented herein be ended (*Republic Natural Gas Co.* v *Oklahoma, supra,* at p. 87).

The record here also shows that the judgment of the Court of Appeals has in fact fully adjudicated federal rights and that that adjudication is not subject to further review by a state court. *Gospel Army* v. *Los Angeles* (1947), 331 U. S. 543, 546.

Nothing further remains to be litigated in this particular case. The Court of Appeals has found as a matter of law that the Comptroller's apportionment is arbitrary and unfair. In concluding its opinion, that Court says:

> ". . . The order of the Appellate Division should be reversed and the matter remitted to the comptroller for further proceedings not inconsistent with this opinion."

An entirely new apportionment formula, eliminating the arbitrary minima of which the Court of Appeals complained, will have to be devised and applied by the Comptroller. If and when any such new formula is so devised and applied, the appellant's right, if any, to a

tax refund and the amount thereof will have to be the subject, not of a new trial herein below, but of an entirely new administrative determination by the Comptroller pursuant to § B46-7.0 of the Administrative Code of the City of New York (Appendix D, *infra*).

After such new determination is made, this taxpayer, in order to seek judicial review thereof, will have to institute an entirely new court proceeding in the nature of certiorari, pursuant to Article 78 of the New York Civil Practice Act, *ibid.* However, any federal or non-federal questions that may be raised by this taxpayer in such new court proceeding cannot, in view of the appellant's commitment on the record herein, be pursued beyond the Court of Appeals of the State of New York.

Such new administrative determination and new court proceeding can and should, as the record herein now stands, be treated as a severed and independent controversy and not as a part of the main litigation, the principal purpose of which has been and is to determine whether these local business privilege tax laws are valid under the Commerce and Due Process Clauses of the United States Constitution when applied to segregated interstate business receipts on any "apportioned" basis, regardless of its form or content. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 127, and cases cited.

(c) The Federal Questions Here Were Duly Raised In Accordance With the Particular State Practice.

By an order dated the 18th day of February, 1954 (ff. 1183-1188), which was not opposed by the appellee, the Appellate Division of the Supreme Court of the State of New York granted a motion by appellant (ff. 1147-1173) for an order:

> (1) Directing that such motion be heard by that Court along with the argument of the main proceeding;

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(2) Directing that such motion and any order entered thereon be physically incorporated in and made an integral part of the record on review in the proceeding as a supplement to the existing record on review;

(3) Permitting and authorizing said Court to decide the various reframed points appearing at folios 1152-1171, in which the validity of these local business privilege tax laws as applied herein are attacked on the ground of their being repugnant to the United States Constitution (28 U. S. C. § 1257 (2)), such points embracing substantially the same federal questions stated by this appellant in its notice of appeal to this Court and in this jurisdictional statement;

(4) Declaring that said points asserting the invalidity of said laws for the reasons and on the grounds stated have been presented to such Court for decision in a due and timely manner according to the practice of the courts of the State of New York.

These federal questions were therefore raised *in limine*, that is, at the first hearing of this cause in the courts of the State of New York.

Questions Presented

The following questions are presented on this appeal:

1. Whether said municipal gross receipts tax laws, when applied, with or without "apportionment", to appellant's gross receipts derived from its sales of goods for shipment and delivery from New York City to customers of appellant in other states and so shipped and delivered, are invalid because, regardless of any method of "apportionment", they are repugnant to the United States Constitution, in that they impose a prohibited local tax

(i) directly upon gross receipts derived from interstate commerce,

(ii) directly upon the interstate commerce itself,

(iii) which amounts to a direct burden upon interstate commerce by taking from the taxpayer a certain portion of every dollar of gross income therefrom,

(iv) which is expressly imposed for the privilege of engaging in interstate commerce, and

(v) which amounts in its practical operation to a potential discrimination against and hence a prohibited local regulation of interstate commerce by subjecting gross receipts therefrom to the risk of multiple taxation,

and hence said laws constitute a prohibited and invalid regulation of interstate commerce in conflict with, and repugnant to, Article I, Section 8, Clause 3 (the Commerce Clause) and Article VI, Clause 2 (the Supreme Law of the Land Clause) of the United States Constitution.

2. Whether the only proper "apportionment" of appellant's gross receipts for the purposes of this local gross receipts tax is between those receipts derived from local intrastate sales and those derived from the kind of interstate sales involved in this proceeding, the former (local intrastate sales receipts) being separate and apart from the interstate sales and having been segregated and fully taxed in this case and not being involved in these proceedings, and whether these local laws, as applied here, are invalid because they purport to "apportion" these separate interstate sales receipts for the purpose of imposing this tax on a part thereof or (which is the same thing) at a certain rate upon *all* of such interstate gross receipts, contrary to the Commerce Clause of the Federal Constitution.

3. Whether there is, in fact, an absence here of any separable, locally taxable intrastate incidents, events, or activities occurring in the City and State of New York

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in connection with such integral interstate sales transactions, and, if so, whether, for that reason, there is lacking here any factual, lawful, or constitutional basis for the City's taxation, at any rate of tax, of all or any part of such gross receipts from interstate commerce, by reason of the Commerce Clause of the Federal Constitution.

4. Whether these local New York City tax laws are invalid when applied on any apportioned basis to interstate sales receipts because, regardless of any apportionment, they necessarily reach out across state lines and subject to taxation gross receipts produced by activities occurring outside of the State of New York, and whether in that aspect they amount to violations of the "due process" clause of the Fourteenth Amendment of the Constitution of the United States, for the reason that there are no political restraints that can be exercised outside of the State of New York, in the states of origin of the goods or in the states where the business is solicited and the goods are delivered and consumed, for the purpose of imposing, removing, or controlling in any way this New York City tax burden upon gross receipts derived from activities carried on in such other states.

Statutes Involved

There is here drawn in question the validity of two chapters of the Administrative Code of the City of New York: Chapter 46, Title B, General Business and Financial Tax, §§ B46-1.0 to B46-18.0, inclusive, and Chapter 41, Title RR, General Business and Financial Tax, §§ RR41-1.0 to RR41-18.0, inclusive. The two chapters are substantially identical. Chapter 46, Title B, is set forth in Appendix D.

Statement

The appellant Gulf Oil Corporation is not a New York corporation but a Pennsylvania corporation with principal office in Pittsburgh, Pennsylvania. The State of New York has granted to the appellant the privilege of doing local intrastate business therein in a corporate capacity and has imposed license fees and taxes therefor (Article 9-A, Tax Law). The State has not purported to require the payment of any privilege tax for the doing of interstate business therein, as it has no power to grant that privilege, withhold it, or tax it.

Appellant is subject to and has paid general real property taxes on its property located in the City and State of New York and local sales and compensating use taxes of the City of New York on local city transactions.

The above-mentioned New York City business privilege tax laws do not impose net income taxes or property taxes or commutation taxes, *i. e.*, taxes in lieu of property or other taxes, but are independent of, and impose levies in addition to those imposed by, the other tax laws to which the appellant is subject.

These business privilege tax laws contain the same provisions that were before this Court in *Joseph* v. *Carter & Weekes* (1947), 330 U. S. 422. They are also the same laws that have been brought before this Court in *Gerosa* v. *United Piece Dye Works*, docketed on November 26, 1954 as No. 461, a companion case, in which the petition for writ of certiorari sets forth in an appendix a copy of the opinion of the Court of Appeals in this case.

The interstate business here taxed consists of the sale of petroleum products for delivery from New York City to customers of appellant located in other states.

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Virtually all of the sales activities, all complaints by customers and all adjustments thereof, nine tenths or more of the credit investigations and control of credit, and all loans to these out-of-state customers of pumps and tanks and the repairs and maintenance thereof in connection with such interstate sales to them were carried on, made, effected, and administered by employees of the appellant permanently located and acting in the out-of-state territories where the deliveries to the customers were made. It is therefore an undisputed fact that the *loci* of the activities which "were the decisive factors in establishing and holding this market", that is, the "source of the customer relationship" with these customers (*Norton v. Department of Revenue*, 340 U. S. 534), was not in New York but was in the out-of-state sales districts of the appellant where both appellant's customers and appellant have regular places of business.

It is true that an indeterminate part of the petroleum products so sold were manufactured in the City of New York and commingled with other like products manufactured outside New York. However, this fact is not relevant because the express impact of these business privilege tax laws is upon the sales transactions by means of a tax directly upon the gross receipts derived therefrom imposed for the privilege "of making sales within such city" and not upon manufacturing or for the privilege of manufacturing. See Taxpayer's Exhibits 1 and 20, printed tax return forms (items 2 and 16-28) promulgated and required by the appellee to be filed by each taxpayer engaged in the business of making sales in interstate commerce.

Each of appellant's interstate sales (being the only transactions here involved) is, in fact, a single, integral, and unitary transaction in interstate commerce. It is true that each such transaction has various phases, such as the out-of-state solicitation of the business, the nego-

tiation of sales contracts, the ordering of the goods by the out-of-state purchasers, the physical shipment of the goods from New York, the interstate transportation thereof, the delivery to the customers in other states, the billing of the purchase price, and the payment thereof. However, the fact is that each and every such phase, regardless of where it may occur, is but an inseparable incident of an integral interstate sales transaction. Each such incident is incapable of standing alone and is completely dependent for its occurrence and fruition upon the occurrence of all of the other incidents of each such integral transaction.

The only physical activities occurring in the City of New York with respect to such sales (other than those, if any, involved in interpreting and administering general sales policies of the appellant and in office routine, such as receiving and filling these purchase orders, billing the customers, and receiving payments) are in the nature of interstate stevedoring, that is, loading the barges, trucks, and railroad tank cars, and of interstate transportation from the loading point to the City limits on a continuous journey to the buyer in other states.

The federal questions respecting the validity of these local business privilege tax laws under the Constitution of the United States here sought to be reviewed by this Court were duly raised below, as indicated herein under the heading "JURISDICTION", paragraph (c), entitled "The federal questions here were duly raised in accordance with the particular state practice."

No non-federal questions have been raised or decided in this case.

Certain of said federal questions, being those stated above under the heading "QUESTIONS PRESENTED", were decided adversely to this appellant both by the Appellate

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Division of the Supreme Court of the State of New York and by the Court of Appeals of said State. This is shown by the latter court's opinion and by appellant's notice of motion to amend the remittitur of the Court of Appeals annexed hereto as Appendix B. The Court of Appeals in denying said motion did not express any opinion on this question. It based its denial expressly and solely "upon the ground that the order of this Court (see 307 N. Y. 342) is not a final determination within the meaning of 28 U. S. C. section 1257". (Unpublished opinion, dated December 2, 1954.) Whether its judgment is to be treated as final under 28 U. S. C., section 1257 for the purposes of this appeal is a question not within the province of the Court of Appeals, but within the exclusive power of this Court to determine in the light of this Jurisdictional Statement, of the record herein as it now stands, and the accompanying copies of the brief of the appellant submitted to the Court of Appeals on the argument there of this cause.

The Questions Are Substantial

Appellant respectfully submits that the questions herein presented are so substantial and so fraught with serious consequences to the public as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

The principal contention of the appellant before the Court of Appeals and here is that these municipal business privilege tax laws, to the extent that they impose any tax for the privilege of making interstate sales and also because they lay the impost here directly upon the separate gross receipts derived therefrom, are invalid in their entirety under the Commerce and Due Process Clauses of the United States Constitution.

The appellant, in the State courts, also made an alternative and subsidiary federal contention to the effect that if its said principal contention should be decided against it, nevertheless, the particular method of "apportionment" adopted by the appellee to carry out the express command of these laws is arbitrary and renders the laws invalid, as so applied, because such "apportionment" subjects these receipts to the risk of multiple taxation contrary to the Commerce Clause. It was this subsidiary federal question that the Court of Appeals decided in favor of the appellant after overruling appellant's principal contention.

This is the first case that has ever been brought before this Court in which was drawn in question the constitutional validity of a local taxing law imposing a so-called "apportioned" tax upon gross receipts from interstate sales for the privilege of making such sales.

It is well known that since the business depression of the 1930's the City of New York has assumed the role of pioneer in efforts to raise tax money, first for unemployment relief and later for general revenue, through the imposition of sales, compensating use, and gross receipts taxes. It is also well known that these tax laws have been copied substantially in many states.

So far as appellant is aware, only one other jurisdiction, the City of Philadelphia, has written into its gross receipts tax scheme the substance of New York City's now invalid "apportionment" formula (Philadelphia Mercantile License Tax Regulations, § 404 (a), CCH All-State Sales Tax Reporter, Vol. 2 ¶65-555).

This decision by a court of the stature of the New York Court of Appeals, however, will doubtless encourage other local and state legislatures to adopt some sort of apportionment basis for imposing gross receipts privilege

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taxes upon interstate sales receipts. A decision by this Court at this juncture that no such tax is permissible, regardless of any method of apportionment, will avoid the confusion that may otherwise follow in the meantime.

Sooner or later appellant's principal contention will be before this Court. In the meantime, however, taxpayers in the City of New York and other jurisdictions, as well as the taxing authorities therein, will be uncertain as to their ultimate rights and liabilities in such a situation.

There are literally thousands of taxpayers in the City of New York alone who are subject to this gross receipts privilege tax on interstate sales receipts. See City's petition in *Gerosa* v. *United Piece Dye Works*, No. 461, O. T. 1954, pp. 7-8. New York City is the country's greatest center of commercial activities involving interstate commerce. These thousands of interstate sellers should be given the benefit of a ruling by this Court on the question of whether they should pay any such local business privilege tax, apportioned or unapportioned, on the gross receipts they derive from their interstate sales.

If, on this appeal, this Court should hold that there is no such liability at all, then a needless multiplicity of burdensome and expensive proceedings and suits involving the formulation and validity of such interstate sales "apportionment" formulae, payments of taxes under protest, claims for refund, administrative hearings thereon, appeals to the courts, etc., etc., will have been avoided. The avoidance of such needless multiplicity of suits and proceedings will be beneficial not only to the municipal and state taxing authorities but also to the courts, federal and state, and to the many thousands of taxpayers affected.

As noted above, a companion case, *United Piece Dye Works* v. *Joseph*, 307 N. Y. 780, 121 N. E. (2d) 617 (ad-

vance sheets), is now the subject of a petition for writ of certiorari filed in this Court November 26, 1954, *sub nom. Gerosa* v. *United Piece Dye Works* (No. 461, O. T. 1954). In that case the determining ultimate fact, as found by the Appellate Division of the Supreme Court of the State of New York and adopted by the Court of Appeals, is that the taxpayer was engaged exclusively in interstate commerce in the City of New York. (Compare *Spector Motor Service* v. *O'Connor* (1951), 340 U. S. 602.)

In this case the appellant's business consists of making three separate and distinct classes of sales:

(1) local intrastate sales in the City of New York (upon which it pays without protest the full unapportioned tax imposed by these laws);

(2) export sales therefrom, which the federal constitution expressly exempts from this tax; and

(3) the interstate sales here involved, under which the goods are shipped from the City to customers in other states. The receipts from each such class of sales are readily separable from those derived from the other classes, and have been so segregated in this case.

Appellant submits that it is important to taxing jurisdictions, state and local, to be made aware of their constitutional limitations in this important field of constitutional law, particularly because of the doubts and confusion in this respect created by *dictum* in certain decisions of this Court, commencing with *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, and reaching a climax in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33.

The *dictum* in question gave rise to the erroneous conclusion that merely "apportioning" gross receipts from interstate sales to those activities occurring in the taxing

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jurisdiction validates an otherwise unconstitutional taxation thereof.

Subsequent decisions of this Court have shown that such a conclusion is unwarranted.

Compare:

McLeod v. *Dilworth Company* (1944), 322 U. S. 327;
Freeman v. *Hewit* (1946), 329 U. S. 249;
Joseph v. *Carter & Weekes Stevedoring Co.* (1947), 330 U. S. 422; and
Norton v. *Department of Revenue* (1950), 340 U. S. 534.

The *Norton* case, *supra*, should be considered in the light of the undisputed fact that the particular interstate transactions here involved are dissociated from the local taxable business, are readily segregable from such local business, and have been so segregated, as required by the appellee's tax return forms, and the further fact that the appellant has not so mingled its local taxable business with that which it contends here is not taxable as to require any administrative or judicial judgment to separate the two. The appellant here "does not, by engaging in [redacted] business within the State, lose its right to do interstate business with tax immunity, *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384", as stated in the *Norton* case.

See in this connection the case of *Interstate Oil Pipe Line Co.* v. *Stone* (1949), 337 U. S. 662, a five to four decision, which we think would have been decided differently had Mr. Justice Burton considered the transportation in that case to be interstate rather than local.

The invalidity of a state or municipal tax law which purports to impose an apportioned gross receipts tax

upon interstate sales receipts for the privilege of engaging in the business of making such sales is supported by a line of cases decided by this Court during the fifty year period prior to the 1938-1940 period.

Some of these earlier cases, with which the decision of the Court of Appeals is in clear conflict, are:

Ratterman v. *Western U. Teleg. Co.* (1888), 127 U. S. 411, in which this Court required a segregation or apportionment, not of the interstate receipts, but of the total receipts of the telegraph company, holding that the interstate receipts were wholly exempt from the state tax by reason of the Commerce Clause, and that the local intrastate receipts were fully taxable;

Western Union Telegraph Co. v. *Seay* (1889), 132 U. S. 472, expressly following the *Ratterman* case, *supra;*

Galveston, H. & S. A. R. Co. v. *Texas* (1908), 210 U. S. 217, invalidating a state law that imposed, on a local mileage apportionment basis, a gross receipts tax upon the receipts of a railroad which, though earned entirely on lines within the taxing state, were derived in part from purely local transportation and in part from interstate transportation;

Meyer v. *Wells, Fargo & Co.* (1912), 223 U. S. 298, which invalidated a state law also imposing an "apportioned" tax upon the gross revenue of an express company derived largely though not wholly from interstate commerce;

Crew Levick Company v. *Pennsylvania* (1917), 245 U. S. 292, holding that under the Commerce Clause gross receipts from sales to foreign countries are immune from state taxation, where Mr. Justice Pitney based the decision on cases relating principally to interstate commerce, saying (p. 296) that there is no

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difference between interstate commerce and foreign commerce so far as the precise question before the court was concerned;

International Paper Co. v. *Massachusetts* (1918), 246 U. S. 135, affirming the doctrine that a state cannot require a foreign corporation, such as appellant, to submit to a tax on or measured by its interstate business as a condition of the privilege of doing a local business in the state;

People v. *Knapp* (1920), 230 N. Y. 48 (cert. denied 256 U. S. 702), following the doctrine of *International Paper Co.* v. *Massachusetts, supra;* and

Sprout v. *South Bend* (1928), 277 U. S. 163, invalidating a flat municipal license fee on busses which were engaged both in intrastate and interstate commerce on the ground that a state is inhibited from conditioning the exercise of the privilege of engaging in interstate commerce upon the payment of an occupation or privilege tax.

For the foregoing reasons we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

MATTHEW S. GIBSON,
Counsel for Appellant,
Office & P. O. Address,
17 Battery Place,
New York 4, New York.

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APPENDIX A

307 N. Y. 342, 121 N. E. 2d 360

GULF OIL CORP. v. JOSEPH.

Court of Appeals of New York.

July 14, 1954.

Proceeding pursuant to Civil Practice Act, § 1283 et seq., to review final determination of comptroller of City of New York denying petitioner's application for refund of $11,040.08 paid pursuant to General Business and Financial Tax Law for four annual privilege periods beginning July 1, 1945 and ending June 30, 1949. The Supreme Court, Special Term, New York County, transferred proceedings to the Appellate Division, 283 App. Div. 309, 127 N. Y. S. 2d 684, which, by divided court, upheld determination and petitioner appealed. The Court of Appeals held that formula promulgated by city comptroller, for purpose of determining gross receipts tax on business done within city, allocating a minimum of 33⅓ per cent of interstate receipts to taxable gross receipts was arbitrary and not in harmony with legislative intent of taxing only that part of interstate receipts which are properly allocable to doing business within city.

Order reversed and matter remitted to comptroller for further proceedings not inconsistent with opinion.

Matthew S. Gibson, New York City, for appellant.

Adrian P. Burke, Corp. Counsel New York City (Bernard H. Sherris and Stanley Buchsbaum, New York City, of counsel), for respondent.

Per Curiam.

In this article 78 proceeding petitioner, a foreign corporation, which carried on substantial local intra-city and intrastate sales activities as well as interstate business,

seeks an annulment of the final determination of the comptroller of the City of New York, denying its application for a refund of gross receipts taxes paid during the years 1946 through 1949 for the privilege of doing business in the city. Administrative Code of City of New York, ch. 41, tit RR; ch. 46, tit B.

The Administrative Code of the City of New York provides in part that: "Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States • • • the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder." Administrative Code, § RR 41-2.0, subd. b; § B46-2.0, subd. b.

Pursuant to the authority granted, the comptroller has promulgated certain rules and an allocation formula for determining, in a case where a gross receipt cannot in its entirety be subjected to the tax by reason of the Constitution of the United States, what portion is attributable and allocable to the doing of business within the city of New York. The formula adopted (Comptroller's Regulations, art. 211.-I) contains three factors:

(1) The property factor. (The percentage which the average value of real and tangible personal property within the city of New York bears to the total average value of real and personal property employed in business throughout the United States.)

(2) The wages and salaries factor. (The percentage which the wages, salaries, and other personal service compensation paid in connection with business carried on in New York City bears to the total wages, salaries and other personal service compensation paid in connection with business carried on throughout the United States.)

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(3) The receipts factor. (The percentage which the sum of the wholly taxable receipts plus one third of the allocable receipts bears to the sum of the wholly taxable receipts plus the entire allocable receipts.)

(It should be noted that under the formula this receipts factor can never work out to less than 33⅓%.)

The three percentages arrived at are then added together and divided by three to obtain the average of the three percentages. "Where the resultant average of the three percentages exceeds 66⅔%, it shall be reduced to 66⅔% for the purpose of allocation. *Where the resultant average of the three percentages is less than 33⅓% it shall be increased to 33⅓% for the purpose of allocation.*" (Comptroller's Regulations, art. 211.-I; emphasis supplied.)

In the present case for three of the four tax years involved the computations under the three-factor formula were 32.2%, 30.85% and 31%. Accordingly, those percentages were raised to meet the 33⅓% minimum.

The questions presented are: (1) whether in a case such as this where the taxpayer is engaged in both intrastate and interstate commerce the city may include in the measure of its gross receipts tax, imposed for the privilege of doing business in New York City, a share of the receipts from interstate sales which is properly attributable and allocable to the doing of business within the city; (2) whether the formula applied by the comptroller reasonably and lawfully measured the tax, and (3) whether the local law discriminates against petitioner in favor of those engaged solely in intrastate activities.

[1] As to (1): In the case of *Olive Coat Co.* v. *McGoldrick*, 261 App. Div 1070, 27 N. Y. S. 2d 471, affirmed without opinion 287 N. Y. 769, 40 N. E. 2d 642, we answered that question in the affirmative, and the United States Supreme Court decisions since that time are to the same

effect, see e. g., *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609-610, 71 S. Ct. 508, 95 L. Ed. 573; *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 667-669, 69 S. Ct. 1264, 93 L. Ed. 1613.

[2] As to (2): In the Olive Coat Co. case, supra, we held that each of the three factors contained in the formula certainly has some degree of relation to the play of local activity and investment in the acquisition of the total of allocable receipts and that in making an allocation rough approximation is all that is necessary, see *Illinois Central R. R. Co.* v. *State of Minnesota*, 309 U. S. 157, 161, 60 S. Ct. 419, 84 L. Ed. 670; *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 422-423, 67 S. Ct. 444, 91 L. Ed. 390. There, however, the fraction was 55.75% and we were not called to pass upon the prescribed minimum of 33⅓%. Likewise, we did not there give consideration to the charge that the receipts factor was weighted in the city's favor. Here, we reach those questions and we hold that the comptroller in using such minimum figures acted arbitrarily and out of harmony with the declared legislative purpose of taxing only that part of the interstate receipts which is properly attributable and allocable to the doing of business in the city. In setting up minimum figures no attempt at rough approximation or apportionment has been made by the comptroller.

As to (3): An unfair apportionment by one State could result in the risk of multiple taxation which would discriminate against petitioner as one engaged in interstate commerce. A fair apportionment eliminates that risk and here the matter must be remitted to the comptroller for the purpose of making such an apportionment.

[3] There is no merit in the argument that petitioner had its remedy in an alternative formula pursuant to article 210 of the Comptroller's Regulations, for the availability of an alternative method of allocation, which

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may not be arbitrary, cannot save the formula which has in fact been used and which is arbitrary.

We pass upon no other question.

The order of the Appellate Division should be reversed and the matter remitted to the comptroller for further proceedings not inconsistent with this opinion.

LEWIS, *C. J.*, and CONWAY, DESMOND, DYE, FULD, FROESSEL and VAN VOORHIS, *JJ.*, concur.

Order reversed, etc.

APPENDIX B

No. 85

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of

The Application of GULF OIL CORPORATION,
Petitioner-Appellant,

For an Order

—against—

LAZARUS JOSEPH, As Comptroller of the City of New York,
Respondent-Respondent.

NOTICE OF MOTION TO AMEND THE REMITTITUR

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Matthew S. Gibson, verified the 11th day of October, 1954,

and upon the record on appeal and the briefs of counsel herein, and all the other papers and proceedings filed and had herein, a motion will be made at a session of this Court, to be held at the Court of Appeals Hall, Albany, New York, on the 18th day of October, 1954, at the opening of Court on that day or as soon thereafter as counsel can be heard for an order directing and providing,

(1) That the remittitur of this Court herein be recalled and amended by adding thereto, after the sentence ending "not inconsistent with the opinion herein.", the following statements:

> "(a) There was duly drawn in question in this Court the validity of the gross receipts privilege tax laws (General Business and Financial Tax Laws, Administrative Code of the City of New York, Chapter 41, Title RR, and Chapter 46, Title B), of the City of New York, a political subdivision of the State of New York, as applied herein to appellant's interstate sales gross receipts, on the ground of their being repugnant to the Constitution of the United States, and the decision of this Court was in favor of the validity of such tax laws, provided they are applied so as to tax 'only that part of the interstate receipts which is properly attributable and allocable to the doing of business in the City' of New York.
>
> "(b) There were no questions of state law presented herein by the appellant, it having expressly waived reliance upon all such questions.
>
> "(c) The federal questions stated below were duly presented by the appellant to this Court for decision. The effect of this Court's decision and

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opinion was to decide each of said federal questions against the appellant by answering them in the negative on the authority of *Olive Coat Co.* v. *McGoldrick* (261 App. Div. 1070, no opinion, aff'd. without opinion, 287 N. Y. 769), *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609-610, and *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 667-669. Such decisions by this Court of said federal questions were material and necessary to the determination of the issues by this Court as reached and stated in its opinion.

"The precise federal questions so presented by the appellant and decided by this Court adversely to the appellant by answers in the negative are the following:

"I. Whether said municipal gross receipts tax laws, when applied, with or without 'apportionment', to petitioner-appellant's gross receipts derived from its sales of goods for shipment and delivery from New York City to customers of petitioner-appellant in other states and so shipped and delivered, are invalid because, regardless of any method of 'apportionment', they are repugnant to the United States Constitution, in that they impose a prohibited local tax (i) upon gross receipts derived from interstate commerce, (ii) upon the interstate commerce itself, and (iii) for the privilege of engaging in interstate commerce, and thus constitute a prohibited and invalid regulation of interstate commerce in conflict with, and repugnant to, Article I, Section 8, Clause 3 (the Commerce Clause) and Article VI, Clause 2 (the Supreme Law of the Land Clause) of the United States Constitution.

"II. Whether these local privilege tax laws, if

applied to such interstate gross receipts, on the particular local 'apportionment' basis present in this case or on any other local 'apportionment' basis are invalid because if upheld they would constitute a potential discrimination against interstate commerce by subjecting gross receipts therefrom to the risk, merely because the goods are shipped across state lines, of multiple taxation by means of taxes imposed on these same receipts by the other states where the taxpayer also does business, where it solicits the sales here involved, and performs varied services in connection therewith, and where it delivers the goods to its customers for consumption, a risk to which local New York City intrastate sales receipts are not exposed, and because such potential discrimination is a regulation of interstate commerce in conflict with the exclusive and plenary power to regulate same granted to the Congress of the United States by Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause).

"III. Whether the only proper 'apportionment' of petitioner-appellant's gross receipts for the purposes of this local gross receipts tax is between those receipts derived from local intrastate sales and those derived from the kind of interstate sales involved in this proceeding, the former (local intrastate sales receipts) being separable and having been fully taxed in this case and not being involved in these proceedings; and

"Whether the latter (interstate sales gross receipts) are non-segregable and cannot be taxed constitutionally in whole or in part by the states or their political subdivisions at any rate of tax; and

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"Whether these local laws, as applied here, are invalid because they purport to 'apportion' these interstate sales receipts for the purpose of imposing this tax on a part thereof or (which is the same thing) at a certain rate upon *all* of such interstate gross receipts, contrary to the Commerce Clause of the Federal Constitution.

"IV. Whether there is, in fact, an absence here of any separable, locally taxable intrastate incidents, events, or activities occurring in the City and State of New York in connection with such integral interstate sales transactions, and, if so, whether, for that reason, there is lacking here any factual, lawful, or constitutional basis for the City's taxation, at any rate of tax, of all or any part of such gross receipts from interstate commerce, by reason of the Commerce Clause of the Federal Consitution.

"V. Whether these gross receipts privilege tax laws so applied are invalid because they impose a direct burden upon, and hence a prohibited regulation of, interstate commerce under the Commerce Clause of the United States Constitution by taking from the taxpayer a certain portion of every dollar of the gross receipts or gross income derived by the taxpayer from interstate commerce transactions, with potential destructive effect upon such commerce.

"VI. Whether these local New York City tax laws are invalid when applied on an apportioned basis to interstate sales receipts because, regardless of any apportionment, they necessarily reach out across state lines and subject to taxation gross receipts produced by activities occurring outside of the State of New York and whether in that

aspect they amount to violations of the 'due process' clause of the Fourteenth Amendment of the Constitution of the United States, since there are no political restraints that can be exercised outside of the State of New York, in the states of origin of the goods or in the states where the business is solicited and the goods are delivered and consumed, for the purpose of imposing, removing, or controlling in any way this New York City tax burden upon gross receipts derived from activities carried on in such other states."

(2) That the record on appeal herein be further amended by appending thereto this notice of motion, the annexed affidavit of Matthew S. Gibson, verified the 11th day of October, 1954, and any order of this Court in response to this motion; and

(3) For such other and further relief as may be just and proper.

Dated: New York, New York,
October 11, 1954.

Yours, etc.,

MATTHEW S. GIBSON,
Attorney for Petitioner-Appellant,
Office & P. O. Address,
17 Battery Place,
Borough of Manhattan,
City of New York.

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Appendix B

To:

Adrian P. Burke, Esq.,
Corporation Counsel of the
City of New York,
Attorney for Respondent-Respondent,
Office & P. O. Address,
Municipal Building,
Borough of Manhattan,
City of New York.

Raymond J. Cannon, Esq.,
Clerk of the Court of Appeals,
Court of Appeals Hall,
Albany, New York.

Appendix B

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of

The Application of GULF OIL CORPORATION,
Petitioner-Appellant,

For an Order

—against—

LAZARUS JOSEPH, As Comptroller of the City of New York,
Respondent-Respondent.

AFFIDAVIT OF MATTEW S. GIBSON IN SUPPORT OF MOTION TO AMEND REMITTITUR

State of New York,
County of New York—ss.:

MATTHEW S. GIBSON, being duly sworn, deposes and says:

1. Deponent is attorney in fact of, and attorney at law herein for, the above-named petitioner-appellant GULF OIL CORPORATION, and as such is fully faimiliar with all proceedings heretofore had herein.

2. The petitioner-appellant has consistently disclaimed on the record herein any reliance upon any question of state law. Such disclaimer was made in the hearings before the Respondent Comptroller, and was repeated in the Appellate Division, and in this Court (Hearings before the Respondent Comptroller at f. 288; Petition of peti-

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tioner-appellant at f. 116; petitioner-appellant's proposed Findings of Fact, Conclusions of Law, and Final Determination, Taxpayer's Exhibit 30 for Identification, f. 1082; petitioner-appellant's notice of appeal to this Court, ff. 1191-1192; and petitioner-appellant's main brief in this Court, p. 11).

3. Throughout all proceedings heretofore had herein petitioner-appellant has relied exclusively upon questions of federal law, including specific and precise attacks in the Appellate Division and in this Court upon the validity of these local tax laws on the ground of their being repugnant to the Constitution of the United States (Hearings before the Respondent Comptroller at ff. 182-187 and 287-293; Petition of Gulf Oil Corporation, ff. 116-132; petitioner-appellant's proposed Findings of Fact, Conclusions of Law, and Final Determination, Taxpayer's Exhibit 30 for Identification at ff. 1082-1098; petitioner-appellant's Notice of Motion in the Appellate Division requesting that Court to decide whether the local laws in question are invalid under certain stated provisions of the United States Constitution on the specific grounds set forth therein and also to declare in its order that the said grounds asserting the invalidity of said laws had been presented to such Court for decision in a due and timely manner in accordance with the practice of the courts of this State, ff. 1147-1173, and particularly f. 1172; the unopposed Order of the Appellate Division dated February 18, 1954, granting the aforesaid motion; petitioner-appellant's notice of appeal to this Court, ff. 1191-1192; petitioner-appellant's Main Brief in this Court, pp. 11 and 12, and its points therein commencing on pages 13, 14, 46, 47, 59, 61, and 62, respectively, in each of which points petitioner-appellant specifically and with particularity attacked the validity of these local tax laws on the ground of their being repugnant to certain designated

provisions of the Constitution of the United States; and petitioner-appellant's Reply Brief herein to the same effect).

4. The Respondent Comptroller in his brief in this Court says (p. 2):

> "Federal constitutional questions alone have been raised by the petitioner. It has expressly disclaimed any reliance upon any provisions of the Constitution or laws of the State (fols. 116, 288-289, 1177-1178; Pet. Br., p. 11)."

In his brief and in his argument in this Court, the Respondent Comptroller addressed himself solely to such federal constitutional questions, citing and discussing only decisions by the United States Supreme Court, with the sole exception of the decision by this Court in *Matter of Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (without opinion), upon the authority of which the Appellate Division and this Court relied in reaching their respective determinations herein.

5. The majority in the Appellate Division relied solely upon, and considered itself bound by, the *Olive Coat* case, making no reference to any other decision of this Court, while citing five United States Supreme Court decisions in the course of their opinion (ff. 1204-1213).

The two dissenting justices in the Court below recognized that the petitioner-appellant had duly raised in that Court certain federal constitutional questions respecting the validity of these local tax laws. They said at f. 1220:

> "The first contention of the taxpayer that no receipts from any interstate transactions may be included in the tax base under the Federal constitution would seem to be untenable."

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Reference is again made here to the order of the Appellate Division at ff. 1183-1187 granting petitioner-appellant's motion, appearing at ff. 1147-1173.

6. Deponent is not willing to presume that these substantial and necessary federal questions were arbitrarily ignored by this Court or that this Court so framed its opinion (307 N. Y. 342, adv. sh.) as to render it a mere device to prevent a review of its decision by the United States Supreme Court upon the federal questions raised herein. Rather, deponent has concluded that this Court refrained, for the time being, from making an express and unequivocal decision herein on said federal questions in the justifiable belief that such a decision now would be premature. This Court could well have considered that its judgment herein lacked the necessary finality for purposes of an appeal now to the United States Supreme Court (28 U. S. C. A., § 1257), since this Court remitted the matter to the Respondent Comptroller with directions that, before applying the tax, he first adopt a new and fair apportionment to New York City of such interstate sales gross receipts and that in doing so he eliminate the two arbitrary minima (one in the "receipts factor" and the other in the over-all apportionment percentage) now present in his apportionment formula.

7. Deponent submits, however, that this Court, in its opinion herein, without so stating expressly, has made a decision in favor of the validity of these local tax laws under the Constitution of the United States, provided they are applied so as to tax "only that part of the interstate receipts which is properly attributable and allocable to the doing of business in the city" of New York. The question of their constitutional validity was duly presented to this Court. It was claimed in this Court by the petitioner-appellant that these tax laws are invalid

under the United States Constitution as applied to the interstate sales gross receipts here, regardless of the particular apportionment or allocation present in this case or of any other similar or dissimilar apportionment or allocation.

This Court, in its opinion, stated that the first question presented to it for decision was "whether in a case such as this where the taxpayer is engaged in both intrastate and interstate commerce the City may include in the measure of its gross receipts tax, imposed for the privilege of doing business in New York City, a share of the receipts from interstate sales which is properly attributable and allocable to the doing of business within the City." This Court's answer to that question was given in its opinion as follows:

> "In the case of *Olive Coat Co.* v. *McGoldrick* (261 App. Div. 1070, affd. without opinion 287 N. Y. 769), we answered that question in the affirmative, and the United States Supreme Court decisions since that time are to the same effect (see, e. g., *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609-610; *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 667, 669)."

This Court's reference to and reliance upon the above two decisions of the United States Supreme Court (see particularly the page citations thereof) would apparently seem to demonstrate, in the light of the Record on Appeal and of the briefs of the parties herein, that this Court was deciding the necessary and substantial federal questions duly presented to it by the petitioner-appellant. However, under relevant decisions of the United States Supreme Court, deponent is advised, failure of this Court to make any express reference in its opinion to the provisions of the United States Constitution upon which the petitioner-appellant relied in its claims herein that these tax laws

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are invalid as being repugnant to such provisions, unless clarified by this Court, might well warrant the conclusion, despite such citations of Supreme Court decisions, that this Court has decided in favor of the validity of these tax laws (if applied in the manner indicated in the opinion) on grounds of state law, instead of upon substantial and necessary federal questions, the only questions presented to it for decision (see *Joseph D. McGoldrick, Comptroller of the City of New York* v. *Gulf Oil Corporation* (1940), 309 U. S. 2 and 309 U. S. 414, 421, footnote 1, and cases cited, and *Osborne* v. *Clark*, 204 U. S. 565, 567-568).

8. This Court's decision in favor of the validity of these gross receipts tax laws under the United States Constitution, if applied to interstate sales gross receipts by means of an appropriate "apportionment" formula yet to be adopted, renders uncertain the rights and liabilities, not only of the City of New York but also of the many thousands of sellers in New York City who, like petitioner-appellant, sell goods for shipment from New York City to other states. Whether these interstate sellers should pay any such local privilege tax, allocated or unallocated, on the gross receipts from such interstate sales is of great importance to them. Until this primary question is conclusively answered by the United States Supreme Court, they and the City are left in doubt as to whether there is any tax liability at all in a case such as this. If on an appeal now to the United States Supreme Court it be held that there is no such liability at all, then a burdensome multiplicity of suits and proceedings involving the formulation and validity of any new "apportionment" formula or formulas to be adopted by the Respondent Comptroller will have been avoided, a result which would benefit the City, the courts of this State, and the taxpayers.

9. For the foregoing reasons, which petitioner-appel-

lant considers to be of public importance, petitioner-appellant has, on this day, taken an appeal herein to the United States Supreme Court. (See 28 U. S. C. § 1257, subd. 2; *Wilson* v. *Cook*, 327 U. S. 474). Deponent is advised that the briefs of the parties are not treated by the United States Supreme Court as a part of the record on an appeal to it, and will not be considered by that Court in determining the question of whether it has jurisdiction of an appeal under 28 U. S. C., § 1257, subd. 2. This Court's remittitur herein dated July 14, 1954, as supplemented by this Court's opinion herein, fails to show clearly that in this Court there was "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity" (28 U. S. C., § 1257, subd. 2).

Deponent is further advised that in any such appeal herein to the United States Supreme Court it will be incumbent upon the petitioner-appellant to prove *in limine* that substantial and material federal questions were raised in this Court in a proper and timely manner and were (1) either decided by this Court as a necessary ground of its determination and judgment, to the exclusion of any adequate ground of state law, or (2) ignored by this Court. Affirmative proof of such facts must be incorporated physically in the Record on Appeal in this Court in order that the United States Supreme Court may have jurisdiction to entertain such an appeal to it.

10. Deponent further submits that the requisite finality of this Court's judgment for purposes of its pending appeal to the United States Supreme Court has now been established herein by means of the order of the Supreme Court, New York County, entered herein on motion of petitioner-appellant heard on the 4th day of October, 1954. A copy of said order is annexed hereto and made a part

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hereof. The memorandum opinion of the Court, per Felix C. Benvenga, *J.*, granting such motion states:

> "Upon the foregoing papers this motion for amendment of the appeal record is granted. It seems to the court utterly reasonable that the plaintiff (sic) be enabled to seek the proposed review by the United States Supreme Court and that such review be implemented by the relief in the manner here sought. Settle order."

Deponent, as attorney in fact of the petitioner-appellant, hereby reaffirms the commitment and undertaking of the petitioner-appellant recited in said order.

WHEREFORE, deponent respectfully prays that this Court (1) recall and amend its remittitur herein dated July 14, 1954, in the manner set forth in the notice of motion accompanying this affidavit; (2) order that the record on appeal herein be further amended and supplemented by appending thereto the annexed notice of motion, this affidavit, the papers attached hereto, and any order of this Court with respect to this motion; and (3) grant such other and further relief as may be just and proper.

MATTHEW S. GIBSON.

Sworn to before me this
11th day of October, 1954.

(Signed) CHESTER MOELLER
Notary Public

(Seal)

Appendix B

COPY

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Court House, Borough of Manhattan, City of New York, on the 8th day of October, 1954.

Present—HONORABLE FELIX C. BENVENGA.

7985—1953

In the Matter of

The Application of GULF OIL CORPORATION,
Petitioner-Appellant,

For an Order

—against—

LAZARUS JOSEPH, As Comptroller of the City of New York,
Respondent.

ORDER

The petitioner-appellant, having moved this Court for an order supplementing the record on appeal to the Court of Appeals herein, now on file in this Court, and said motion having duly come on to be heard before me at a Special Term, Part I, for the hearing of motions, on the 4th day of October, 1954,

Now, on reading and filing the notice of motion of the petitioner-appellant dated the 24th day of September, 1954, the affidavit of Matthew S. Gibson verified the 24th day of September, 1954, in support of said motion,

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And after hearing Matthew S. Gibson, attorney for the petitioner-appellant, in support of the motion, and after considering the affidavit of Stanley Buchsbaum, Esq., Assistant Corporation Counsel of the City of New York, of counsel to Adrian P. Burke, Esq., Corporation Counsel of the City of New York, attorney for the respondent, in opposition to said motion, and due deliberation having been had,

Now, on motion of Matthew S. Gibson, attorney for the petitioner-appellant, it is hereby

ORDERED that the said motion be and the same hereby is granted and that the record on appeal in the Court of Appeals herein, now on file in this Court, containing the judgment of the Court of Appeals dated the 14th day of July, 1954, which was made the order and judgment of this Court by order entered herein on the 13th day of August, 1954, be and the same hereby is amended and supplemented by incorporating in said record the formal commitment and undertaking of the petitioner-appellant GULF OIL CORPORATION by its attorney in fact, Matthew S. Gibson, contained in his said affidavit verified the 24th day of September, 1954, as follows:

> "GULF OIL CORPORATION hereby stipulates, agrees, and undertakes that in the event the Supreme Court of the United States takes jurisdiction of and entertains petitioner-appellant's forthcoming appeal to said Court from the judgment of the Court of Appeals entered herein on the 14th day of July, 1954, and affirms said judgment of the Court of Appeals on the merits of the federal questions to be presented to the United States Supreme Court by the petitioner-appellant, then, and in that event, petitioner-appellant GULF OIL CORPORATION will not take or attempt to take any further appeal herein to the Supreme Court of the United States, re-

gardless of the disposition hereafter made in the courts of this State of any federal or non-federal question or questions that may be presented or that may arise in any subsequent proceeding herein, whether before the Respondent Comptroller or before the courts of this State."

Enter,

/s/ FELIX C. BENVENGA,
J. S. C.

The form of the foregoing order is consented to.

/s/ ADRIAN P. BURKE
SB
Adrian P. Burke
Attorney for the Respondent

[The papers comprising Appendix B were duly certified by the Clerk of the Court of Appeals of the State of New York and sealed with the seal of said Court on the 6th day of December, 1954.]

APPENDIX C

283 App. Div. 309, 127 N. Y. S. (2d) 684

GULF OIL CORP. v. JOSEPH.

Supreme Court, Appellate Division, First Department.

Feb. 16, 1954.

Proceeding pursuant to Civil Practice Act, § 1283 et seq., to review final determination of comptroller of City of New York denying petitioner's application for refund of gross receipts taxes. The Supreme Court, Appellate Division, held that formula, promulgated by city comptroller

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pursuant to administrative code authority, apportioning, for purpose of determining gross receipt tax on business done within the city, receipts from sales in interstate commerce was not void as interfering with interstate commerce or as being arbitrary, though it provided for a minimum allocation of 33⅓ per cent of interstate receipts to gross receipts taxed, did reasonably measure the tax, and did not discriminate against taxpayer in favor of those engaged solely in local activities.

Determination of comptroller confirmed.

Callahan, *J.*, and Peck, *P. J.*, dissented.

Matthew S. Gibson, New York City, for petitioner.

Bernard H. Sherris, New York City, of counsel (Stanley Buchsbaum, New York City, on the brief; Denis M. Hurley, Corp. Counsel, New York City, attorney), for respondent.

Before Peck, *P. J.*, and Callahan, Bastow, Botein and Bergan, *JJ.*

Per Curiam.

The petitioner, a Pennsylvania corporation, does an extensive interstate as well as intrastate business. It brings this Article 78 proceeding to review a final determination of the Comptroller of the City of New York, denying its application for a refund of gross receipts taxes paid during the years 1945 through 1949 for the privilege of doing business in the City. Administrative Code of City of New York, Chapter 41, Title RR. The law provides that where receipts cannot be taxed in their entirety by reason of the Federal Constitution, the Comptroller shall establish rules, regulations and methods of allocation to the end that only such part of the receipts as is attributable and allocable to the doing of business in the city shall be taxed. The Comptroller has promulgated certain rules

and allocation formulae for apportioning such taxable receipts from sales in interstate commerce.

We regard *Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769, 40 N. E. 2d 642, affirming 261 App. Div. 1070, 27 N. Y. S. 2d 471, as controlling on every aspect of this proceeding and as compelling a confirmation of the Comptroller's determination. That case reviewed and approved the same local tax law and the same allocation formulae as are involved here. See also *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 at pages 609-610, 71 S. Ct. 508, 95 L. Ed. 573; *International Shoe Co.* v. *Shartel*, 279 U. S. 429, 49 S. Ct. 380, 73 L. Ed. 781; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 at page 428, 67 S. Ct. 815, 91 L. Ed. 993; *United Air Lines* v. *Joseph*, 282 App. Div. 48, 121 N. Y. S. 2d 692.

Some of us entertain reservations concerning the soundness of certain ingredients of the Comptroller's allocation formula. Roughly, this is a three-factor formula which seeks to allocate the appropriate percentage of interstate sales subject to tax by striking ratios between, first, the value of the taxpayer's property in the city and the value of its property elsewhere in the United States, and, second, between wages paid locally and elsewhere in the country. For the third factor the Comptroller has devised what purports to be a basis for computing a proper percentage of gross receipts. The total of the three percentages thus obtained is then averaged through dividing by three. If the result exceeds 66⅔% it is reduced to that figure; if it is less than 33⅓% it is increased to that figure. The resultant computation becomes the percentage of interstate commerce allocated to the gross receipts tax.

There is no doubt that the formula will operate unevenly and in some instances work hardships; and it can be argued with some persuasiveness that the receipts factor is weighted in favor of the city. But something short of laboratory uniformity will satisfy the constitutional re-

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quirements. In this connection it was said in *Illinois Cent. R. Co.* v. *Minnesota*, 309 U. S. 157 at page 161, 60 S. Ct. 419 at page 422, 84 L. Ed. 670:

> "That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system."

More vexing is that provision in the Regulations which fixes a minimum allocation of 33⅓% of the interstate receipts as subject to the tax. Conceivably, the imposition of such an arbitrary figure could discriminate against interstate commerce. For example, if the three-factor formula has integrity, and results in an indicated allocation of, let us say, 2% of interstate receipts, it might be difficult to justify a 33⅓% allocation as reasonably apportioned to the taxpayer's activities within the city.

However, the taxpayer in the *Olive Coat Co.* case, *supra*, explicitly argued in the Court of Appeals that the allocation formula, including its 33⅓% minimum, was arbitrary, capricious and a denial of due process of law. True, the 33⅓% minimal allocation did not become operative in the *Olive Coat* case, since the averaging of the three factors produced a figure of 55%. But in this case, the computations under the three-factor formula were 32.2%, 30.85% and 31.9% in the three years that the minimum requirement came into play—scarcely a shocking margin in the application of a formula that at best is calculated to produce approximate figures.

Furthermore, the petitioner did not avail itself of the opportunity to make application for a different and more appropriate method of allocation, pursuant to Article 210 of the Comptroller's Regulations, which provides that a taxpayer may make such application, and if "any of the

prescribed allocation formulae works unfairly or inequitably to a particular taxpayer or class of taxpayer, he [the Comptroller] may provide for a different or other method of allocation, etc." Also, since the petitioner operates a refinery in Staten Island, it could probably have used an alternative formula, Article 211, subd. 2, Comptroller's Regulations, which is based on the cost of the interstate goods that were manufactured here.

The determination of the Comptroller is confirmed.

Determination confirmed with $20 costs and disbursements to the respondent. Order filed.

BASTOW, BOTEIN, and BERGAN, *JJ.*, concur.

PECK, *P. J.*, and CALLAHAN, *J.*, dissent.

CALLAHAN, *Justice* (dissenting).

The petitioner is a Pennsylvania corporation maintaining large oil refineries in several states including one in New York City. It stores within the city large quantities of its oil products refined in other states, commingling them with those refined here. It sells both the New York refined oil and the other stored oil in intrastate business in New York as well as in interstate commerce from New York. It conducts numerous operations of its executive, sales and accounting departments here.

The City of New York has imposed a gross receipts tax on petitioner for the privilege of doing its intrastate business in New York. It has enacted local laws imposing that tax and the Comptroller adopted regulations pursuant to those laws indicating how the tax is to be computed.

The questions raised are (1) whether the city may include in the measure of the tax an allocable share of the receipts from interstate sales of the oil sold or refined and sold here; (2) did the formula applied by the city reasonably and lawfully measure the tax; and (3) did the local

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law discriminate against this taxpayer in favor of those engaged solely in local activities.

The regulations provide for the apportionment of the tax imposed where the whole receipts of the taxpayer may not be used as a basis for the tax under the Federal constitution because interstate commerce is involved. The regulations provide that in such instances three factors are to be employed in determining the portion of the receipts from interstate sales which are properly allocable to doing business within the city where sales of goods is the activity of the taxpayer. A New York manufacturer, however, may employ an alternative formula. The three factors used are: (1) a percentage based on the comparative value of locally situated property to all property in the United States; (2) a percentage based on the comparative totals of salaries and wages paid to those workers engaged locally and to all employees of the taxpayer in the United States; and (3) a receipts factor.

Receipts are segregated into four categories (a) receipts from sales in foreign commerce; (b) nonallocable and nontaxable receipts; (c) wholly taxable receipts; and (d) allocable receipts, *i. e.*, receipts from sales from interstate commerce subject to allocation. After the foregoing segregation is made receipts from foreign commerce and nonallocable and nontaxable receipts are deducted. A percentage is then computed on the basis of a fraction, the numerator of which is the sum of the wholly taxable receipts plus one-third of the allocable receipts, and the denominator a sum representing all wholly taxable receipts plus the entire allocable receipts.

The percentage from the foregoing three factors is averaged and if the average is less than 33⅓% it is provided that it shall be increased to that figure for the purpose of allocation.

The first contention of the taxpayer that no receipts from

any interstate transactions may be included in the tax base under the Federal constitution would seem to be untenable. This is an apportioned tax imposed for the privilege of conducting intrastate business and it would seem permissible for the locality to consider receipts from interstate business as well as receipts from intrastate business in fixing the tax so long as the amount of the interstate receipts included is based on a fair proportion of the taxpayer's activity here as compared to its total activities in respect to such interstate transactions. *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 442, 67 S. Ct. 815, 91 L. Ed. 993; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365; *Olive Coat Co.* v. *McGoldrick*, 261 App. Div. 1070, 27 N. Y. S. 2d 471, affirmed 287 N. Y. 769, 40 N. E. 2d 642; *Matter of United Air Lines* v. *Joseph*, 282 App. Div. 48, 121 N. Y. S. 2d 692.

The third claim that the formula is discriminatory is also overruled.

The sole question remaining and the only one that we will discuss at length is the second which concerns the reasonableness and legality of the formula applied.

We think that the formula is unreasonable and illegal insofar as the formula for calculating the receipts factor forces an arbitrary minimum of over 33⅓% of allocable receipts as the receipts factor and a minimum of 33⅓% if the average of the three factors used is less than that percentage. Whatever might be the power of the locality with respect to the use of some minimum where there is no accurate method of ascertaining a fair proportion of the local activities, the use of such minimum where the ability to so accurately measure is conceded, would make the use of the minimum arbitrary.

Appendix C

A receipts factor would undoubtedly be admissible and appropriate, but as in the case of the other factors it shall be calculated on a relevant and not an arbitrary or fictional basis. We do not see how the loaded receipts factor incorporated in the regulations or the use of the one-third overall minimum can be said to indicate a fair proportion of the taxpayer's business allocable to New York City where in fact the proportion computed is ascertainable and may be actually less than one-third.

The requirement as to apportionment is set forth in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438-439, 59 S. Ct. 325, 327, 83 L. Ed. 272, where the court said:

> "• • • under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state [citing cases], burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce • • •.
>
> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state."

And in *Hans Rees' Sons* v. *State of North Carolina*, 283 U. S. 123 at page 134, 51 St. Ct. 385 at page 389, 75 L. Ed. 879, the Supreme Court said:

> "When as in this case, there are different taxing jurisdictions, each competent to lay a tax with re-

spect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

In *Norfolk & W. R. Co.* v. *State of North Carolina*, 297 U. S. 682, 685, 56 S. Ct. 625, 627, 80 L. Ed. 977, the rule was stated as follows:

> "A formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions. *Cf. Hans Rees' Sons* v. [*State of*] *North Carolina*, 283 U. S. 123, 129, 132, 51 S. Ct. 385, 75 L. Ed. 879; *Southern Ry. Co.* v. [*Commonwealth of*] *Kentucky*, 274 U. S. 76, 83, 88, 47 S. Ct. 542, 71 L. Ed. 934. * * * If this is made to appear with an ensuing burden on the taxpayer grossly in excess of the results of a more accurate apportionment, the statute to that extent is an unconstitutional endeavor to tax the income of a business in another jurisdiction. *Hans Rees' Sons* v [*State of*] *North Carolina, supra.*"

If an arbitrary minimum of 33⅓% may be employed, then a minimum of 50% or even more may also be employed. Other states with which these interstate sales came in contact might also exercise the right to impose an arbitrary minimum for the privilege of their local activities and thus multiple taxes would be imposed which would place an unlawful burden on interstate commerce. If the arbitrary minimum is removed and the actual fair proportion used then the danger of such multiple tax would appear to be eliminated. That the regulation also contains

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a maximum of 66⅔% does not justify the use of a minimum. The use of a maximum if lower than the actual would not, of course, contribute to any multiple taxation, nor could it afford any cause of complaint to a taxpayer.

We do not find that the availability of an alternative method of allocation provided in the present regulation justifies what has been done here. It is apparent that the alternative or special allocation is to be applied solely in the discretion of the Comptroller. Such an alternative is not a "remedy" for the taxpayer when its application is solely in the discretion of the tax collector. *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 48, 43 S. Ct. 466, 67 L. Ed. 853. We think that the taxpayer is entitled to have any method applied in fixing his tax to be so drawn that it does not compel it to pay a tax that would unduly burdent commerce and thus conflict with constitutional restrictions

Although the same minimum was in the regulations at the time the *Olive Coat Co.* case, *supra*, was before this Court and the Court of Appeals, the proportion of business in New York was actually 55% and thus the minimum had no application.

My dissent in the *United Air Lines* case, *supra*, and *United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 683, called for no discussion as to the propriety of the formula, since the majority of the court held the imposition of the tax to be unconstitutional and void in any event.

We think that the matter should be remitted to the Comptroller for further action not inconsistent with this opinion.

Peck, *P. J.*, concurs.

APPENDIX D

CHAPTER 46

Special City Taxes

TITLE B

General Business and Financial Tax

Cross Reference: See § O41–1.0 and following and § RR41–1.0 and following for previous General Business and Financial Tax impositions.

§ B46–1.0 *Definitions.*—When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three per centum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

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3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in Schedule A specified.

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

Schedule A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of retirement systems created under section two hundred of the insurance law.

Appendix D

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of cooperative corporations organized under the provisions of the cooperative corporations laws of the state of New York, or agricultural cooperatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

A broker who initiates, executes or clears a purchase or sales contract in conjunction with another broker may deduct from gross income any commissions paid by him to such other broker.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer." The treasurer of the city. (As added by L. L. 1948, No. 44, July 1; as amended by L. L. 1949, No. 57, July 1.)

Appendix D

§ B46–2.0 *Imposition of tax.*—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, for each of the periods of one year, or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section B46–1.0 of this title, for gain or profit within the city for each of the periods of one year, or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to two-fifths of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which each such period of one year shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is

properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of any calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be during the period of one year, commencing on a date subsequent to January first of the calendar year in question and not extending beyond June thirtieth of the year next succeeding such calendar year; and if such person shall not have been so engaged for an entire year prior to June thirtieth of the year next succeeding the calendar year in question, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred forty-eight, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such person together with its own receipts or gross income as provided in this section. (As added by L. L. 1948, No. 44, July 1; as amended by L. L. 1950, No. 72, July 1.)

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Appendix D

§ B46–3.0 *Presumption and burden of proof.*—For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it. (As added by L. L. 1948, No. 44, July 1.)

§ B46–4.0 *Filing of returns.*—Every person subject to tax under this title shall on or before the fifteenth day of June, nineteen hundred forty-nine, and on or before the fifteenth day of June of each year thereafter, file a return embracing the receipts for each of the respective calendar years preceding, under oath with the treasurer, except that any person required by the provisions of subdivision c of section B46–2.0 to file a return for a period beyond the first day of May following any of the calendar years hereinabove in this section mentioned, may file such return on or before the first day of August thereafter. Every person subject to tax under this title shall within thirty days after he ceases to do business file such a return. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or his duly authorized agents or employees shall be empowered to require supplemental returns. Whenever the comptroller shall require supplemental returns, he shall promptly notify the treasurer thereof. If a return required by this title is not filed or if a return when filed is incorrect or insufficient on its face the treasurer shall

take the necessary steps to enforce the filing of such a return or of a corrected return. (As added by L. L. 1948, No. 44, July 1; as amended by L. L. 1950, No. 64, June 23.)

§ B46–5.0 *Payment of tax.*—At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due, except where a person ceases to do business the tax shall be due immediately. (As added by L. L. 1948, No. 44, July 1; as amended by L. L. 1950, No. 64, June 23.)

§ B46–6.0 *Determination of tax.*—If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller, the comptroller shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller shall of his own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under

article seventy-eight of the civil practice act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings. The comptroller shall notify the treasurer of all final determinations. (As added by L. L. 1948, No. 44, July 1.)

§ B46–7.0 *Refunds.*—In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the comptroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section B46–6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section B46–6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax

or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the civil practice act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as provided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the civil practice act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding. (As added by L. L. 1948, No. 44, July 1.)

§ B46–8.0 *Reserves.*—In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the civil practice act to review a determination adverse to him on his application for refund or has deposited the amount of tax assessed in connection with proceedings under section B46–6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city. (As added by L. L. 1948, No. 44, July 1.)

§ B46–9.0 *Remedies exclusive.*—The remedies provided by sections B46–6.0 and B46–7.0 of this title shall be the

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exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or proceeding other than a proceeding under article seventy-eight of the civil practice act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the treasurer prior to the institution of such suit and posts a bond for costs as provided in section B46-6.0 of this title. (As added by L. L. 1948, No. 44, July 1.)

§ B46-10.0 *Proceedings to recover tax.*—a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provisions of this title is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the city sheriff, commanding him to levy upon and sell the real and personal property of such person which may be found within the city, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the

money collected by virtue thereof within sixty days after the receipt of such warrant. The city sheriff shall within five days after the receipt of the warrant, file with the county clerk a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The city sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee or the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

c. Whenever there is made a sale, transfer or assignment in bulk of any part or the whole of a stock of merchandise or of fixtures, or merchandise and of fixtures pertaining to the conducting of the business of the seller, transferrer or assignor, otherwise than in the ordinary course of trade and in the regular prosecution of said business, the purchaser, transferee or assignee shall at

least ten days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefor, notify the comptroller by registered mail of the proposed sale and of the price, terms and conditions thereof, whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee, that it owes any tax pursuant to this title, or title RR, title O, title R, or articles eight to twelve, inclusive, of title E of chapter forty-one of the code or local law number four for the year nineteen hundred thirty-eight, whether or not the purchaser, transferee or assignee has knowledge that such taxes are owing, and whether or not any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give the notice to the comptroller required by the preceding paragraph, or whenever the comptroller shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the city, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the city's claim. For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of section forty-four of the personal property law, shall be personally liable for the payment to the city of any such taxes theretofore or thereafter determined to be due to the city from the seller, transferrer or assignor and such liability may

be assessed and enforced in the same manner as the liability for tax is imposed under this title. (As added by L. L. 1948, No. 44, July 1.)

§ B46-11.0 *General powers of the comptroller.*—In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days, in which case he shall notify the treasurer thereof; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller or other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, pro-

fession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city. (As added by L. L. 1948, No. 44, July 1.)

§ B46-12.0 *General powers of the treasurer.*—In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, and other provision of this title to the con-

trary notwithstanding. (As added by L. L. 1948, No. 44, July 1.)

§ B46-13.0 *Administration of oaths and compelling testimony.*—a. The comptroller or treasurer or his employee duly designated and authorized by him shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

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Such officers shall be the city sheriff, and his duly appointed deputies, or any officers or employees of the office of the comptroller or of the treasurer, designated to serve such process. (As added by L. L. 1948, No. 44, July 1.)

§ B46–14.0 *Penalties and interest.*—a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section B46–11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the treasurer to the effect that a tax has not been paid, and that a return has not been filed or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof. (As added by L. L. 1948, No. 44, July 1.)

Appendix D

§ B46-15.0 *Notices and limitations of time.*—a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the civil practice act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period. (As added by L. L. 1948, No. 44, July 1.)

§ B46–16.0 *Returns to be secret.*—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller and treasurer permit them to be destroyed. (As added by L. L. 1948, No. 44, July 1.)

§ B46–17.0 *Separability.*—If any provision of this title, or the application thereof to any person or circumstances

is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby. (As added by L. L. 1948, No. 44, July 1.)

§ B46–18.0 *Construction and enforcement.*—This title shall be construed and enforced in conformity with sections twenty-four-a, twenty-four-b, and twenty-four-c of the general city law, pursuant to which it is enacted. (As added by L. L. 1948, No. 44, July 1.)

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 473

GULF OIL CORPORATION,

Appellant,

—against—

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

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The Judgment Below Should Be Treated as Final

The motion to dismiss seems on its face to be plausible. The motion correctly states the holdings in the decisions by this Court cited therein on the question of finality. In an ordinary run-of-the-mine appeal these decisions would be conclusive in cases involving the same states of facts.

This is not, however, the ordinary type of appeal lodged in this Court and the facts here are different. While the judgment of the New York Court of Appeals appears not to be final on its face, as pointed out in appellant's jurisdictional statement, it is in fact final, on the record herein: there can be no further appeal in this case to this Court.

Appellee Can Never Bring Any Federal Questions Before This Court

It is true, as stated by the appellee, that if this Court should affirm the decision of the Court of Appeals herein and a new "apportionment" formula later devised by the appellee is also disaffirmed by the Court of Appeals, federal questions may conceivably be involved in such disaffirmance. However, in that event the appellee cannot appeal to this Court because he cannot be heard to complain that the validity of these laws has been upheld; he still has this tax money; he is not an aggrieved party; and he can still devise a new formula. He can, in such case, petition this Court to review such decision on certiorari. The granting or denial of such a petition, however, obviously lies in the absolute discretion of this Court, and we submit that it would not be granted.

If this Court either dismisses this appeal or, after argument on the merits, affirms the judgment of the Court of Appeals and if that Court should subsequently invalidate as arbitrary a *second* "apportionment" formula of the appellee and should again remit the matter to the appellee for the purpose of his devising still a third formula, would this subsequent judgment remitting the case to the appellee, Comptroller, for his further action be a final judgment for the purposes of review by a writ of certiorari sought by him pursuant to 28 U. S. C. § 1257(3)? Obviously not. If, on the other hand, the Court of Appeals should approve such a second "apportionment" formula of the appellee, he could not be heard to complain in this tribunal. Therefore, appellee can never get a review herein by way of certiorari or appeal, and he can never bring any federal questions before this Court despite his suggestion to the contrary (appellee's motion, p. 4, first full paragraph).

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Appellee Seeks to Have This Case Decided in the *Gerosa* Case, No. 461, O. T. 1954

It is obvious that the City of New York, in its petition for writ of certiorari in *Gerosa* v. *The United Piece Dye Works* (O. T. 1954, No. 461), is asking this Court to adopt the principles stated by the Court of Appeals in this case and to apply them in that case, thus foreclosing consideration thereof in this case. (See paragraph 3, pp. 11 and 12 of said petition and the opinion of the Court of Appeals in this case printed in Appendix A at p. 20 of said petition.) The difference on the facts between the two cases is obvious, but the appellee seeks to have this Court cast them in the same mold by shaping them into an "apportionment" formula, despite the undisputed fact that the tax in each case is imposed (1) directly upon gross receipts from interstate commerce, and (2) expressly for the privilege of engaging in such commerce.

Appeal Practice in the New York Courts Is Irrelevant

Despite the quotation, on page 5 of ~~appellant's~~ appellee's motion, from Cohen and Karger, Powers of the New York Court of Appeals, the fact remains that those authors state on page 336 that where, in an Article 78 proceeding such as this, "the Appellate Division annuls the determination and directs further proceedings before the agency, further judicial review of any ensuing determination by the agency can be had only in a second and independent Article 78 proceeding".

These same authors point out on page 50 that it has recently been held that an order of the Appellate Divi-

sion in such an Article 78 proceeding annulling the determination of a Town Board and remitting the matter to the Board for audit and allowance of the claims, is final, notwithstanding that the amount of the allowance is yet to be determined, citing *Matter of O'Hara* v. *Harwood*, 276 N. Y. 561.

In any event, the practice in the New York courts is irrelevant to the issues before this Court. The New York Court of Appeals has jurisdiction of an appeal from a non-final judgment of the Appellate Division. *Cohen* and *Karger, op. cit., supra*, page 5 and page 349, where the authors state: "Serious questions of law, eminently proper for consideration by the Court of Appeals, are not necessarily restricted to final determinations."

Appeals from non-final judgments in New York are granted by permission of the Appellate Division, not the Court of Appeals (*Cohen* and *Karger, op. cit., supra*, page 358):

Irreparable Injury to the Appellant Is Present Here.

The appellee has demanded, under threat of unconscionable penalties (Adm. Code § B46-14.0, Jurisdictional Statement, Appendix D, p. 67), and now holds the appellant's tax payments and refuses to refund them. The administrative proceedings before the appellee are so long-drawn-out as almost to be interminable. It took over five years from May 20, 1948 (R. 56) until May 26, 1953 (R. 57) to complete these administrative hearings before the appellee in this case.

The proceedings before the same appellee in the companion case of *Gerosa* (substituted for *Lazarus Joseph*)

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v. *The United Piece Dye Works* (No. 461, O. T. 1954), were pending without a determination for over two years and nine months.

It is impossible to get these hearings scheduled except at the rate usually of a half day per month (Record in both cases) due to the congested hearing calendar and appellee's manner of scheduling hearings. In the meantime appellant and other taxpayers similarly situated are deprived of the use of this tax money unlawfully withheld by the appellee. The loss of the use of this money is as irreparable as the loss of use of physical property immediately transferred by decree with deferred determination of damages or value or an accounting. There is no telling when this appellant will get any refund and there is no provision for compensating appellant for the loss of use of its money other than interest at the rate of 4% per annum, which does not by any means make the appellant whole.

CONCLUSION

Probable jurisdiction herein should be noted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1954

No. 473

GULF OIL CORPORATION,

Appellant,

against

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

ADRIAN P. BURKE,
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Counsel for Appellee,
Municipal Building,
New York, N. Y.

December 17, 1954

Supreme Court of the United States

October Term, 1954

No. .....

GULF OIL CORPORATION,

Appellant,

against

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the ground that it seeks to bring up for review a non-final determination.

Statement

This is an appeal from a determination of the New York Court of Appeals, entered on July 14, 1954, which reversed a determination of the Appellate Division of the New York Supreme Court and remitted the matter to the Comptroller of the City of New York for further proceedings not inconsistent with the opinion of the Court.

The Comptroller, after conducting formal hearings, had denied the appellant's application for a refund of taxes

paid on an allocated basis pursuant to the New York City General Business and Financial Tax law. The appellant thereupon instituted a proceeding pursuant to Article 78 of the New York Civil Practice Act (in the nature of certiorari) to review this determination. The New York Supreme Court, in accordance with the provisions of the Civil Practice Act, transferred the proceeding to the Appellate Division of that Court. The Appellate Division confirmed the determination of the Comptroller.

An appeal was then taken to the New York Court of Appeals. The Court wrote an opinion in which it held that, since the appellant was engaged in both intrastate and interstate commerce in New York City, it was proper to include in the measure of the gross receipts tax, imposed for the privilege of doing business in that city, a share of the receipts from interstate sales which is properly attributable and allocable to the doing of business therein. The Court, however, went on to hold that the allocation formula used by the Comptroller did not fairly measure that part of the interstate receipts which is properly attributable and allocable to the doing of business in the city. The Court, without specifying the nature of a proper formula aside from pointing out that the use of arbitrary minimum provisions is improper, reversed and remitted the matter to the Comptroller for further proceedings.

The appellant thereupon moved in the New York Supreme Court for, and despite appellee's opposition obtained, an order supplementing the record on appeal by adding thereto a "commitment and undertaking" that, should this Court take jurisdiction of the appellant's forthcoming appeal and affirm on the merits of the federal questions, the appellant would not take or attempt to take any further appeal herein to the United States Supreme Court

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regardless of the disposition thereafter made in the New York courts of any federal or non-federal question that might arise in subsequent proceedings (Jurisdictional Statement, Appendix B, p. 40).

After this order was entered the appellant applied to the New York Court of Appeals for an amendment of the remittitur to state that only federal questions were presented to that Court. The affidavit in support of this application referred to the order described in the prior paragraph. Nevertheless, the Court of Appeals refused to amend the remittitur on the ground that "the order of this court (see 307 N. Y. 342) is not a final determination within the meaning of 28 United States Code, section 1257."

ARGUMENT

The New York Court of Appeals having remitted the matter to the Comptroller for further proceedings involving the exercise of discretion, the appeal is from a non-final determination.

This appeal has been taken pursuant to 28 U. S. C. §1257 and, therefore, should be dismissed unless it seeks to bring up for review a final determination. Although the New York Court of Appeals held that there was a right to tax the appellant, it remitted the matter to the Comptroller of the City of New York for further proceedings. This remission was based on a determination that the allocation formula employed was invalid and it directed the Comptroller to make a fair apportionment. The Court did not specify the method for reaching such a fair apportionment. It is, therefore, obvious that the remission required the Comptroller to exercise discretion in determining a fair method of apportionment. The

amount of tax due cannot be determined until this new method of apportionment is devised by the Comptroller. There is not the slightest basis for treating the action required of the Comptroller as merely ministerial.

The fact that one of the two major issues has been decided does not meet the requirement of finality. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 (1948). This would appear to be particularly true where the remaining issue, the question of fair apportionment, involves a federal question.

This case does not involve the type of situation which has caused this Court to treat as final for review purposes determinations which for other purposes would be deemed interlocutory. Here the appellant will not be irreparably damaged if review is not immediately available. Nor does the determination appealed from decree an immediate transfer of physical property with merely an accounting to follow.

A situation somewhat similar to the case at bar was involved in *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U. S. 398 (1938). In that case the Supreme Court of Missouri had affirmed a determination of the Circuit Court which had affirmed an order of the Public Service Commission fixing the value of a utility company's property for rate making purposes and ordering a reduction in rates. Although it affirmed the judgment, the Missouri Supreme Court directed the Circuit Court to remand the matter to the Public Service Commission to rehear and redetermine the facts on four specified points. An appeal to this Court was dismissed on the ground that it was not taken from a final judgment. It was pointed out that the action required of the Public Service Com-

mission involved the exercise of discretion and might constitute the basis of another appeal. See, also, *Martinez* v. *International Banking Corp.*, 220 U. S. 214 (1911); *Arnold* v. *Guimarin & Co.*, 263 U. S. 427 (1923); *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947).

The determination of the New York Court of Appeals does not acquire finality simply because a review of the determination by the Comptroller upon the remand may require the institution of a new Article 78 proceeding. In COHEN & KARGER, *Powers of the New York Court of Appeals* (1952), it is pointed out that (§77, p. 337):

> "The two Article 78 proceedings are really only related stages of a single proceeding in the nature of an appeal from the administrative agency's determination."

Under New York practice a similar remand to an administrative body by the Appellate Division is treated as a non-final order. *Matter of N. Y. State Electric Corp.* v. *Public Service Commission*, 260 N. Y. 32 (1932); *Matter of Bengent* v. *Noyes*, 284 N. Y. 229 (1940); *Matter of Restaurants Longchamps* v. *O'Connell*, 296 N. Y. 239 (1947); *Matter of Rochester Gas & Electric Corp.* v. *Maltbie*, 298 N. Y. 103 (1948). In fact, such a remand in a tax case involving an analogous New York City tax was treated as not being final. *Matter of Brooklyn Union Gas Co.* v. *Joseph*, 297 N. Y. 469 (1947). [See explanation of this case in COHEN & KARGER, *Powers of the New York Court of Appeals*, §12, p. 52.]

It would seem evident that the appellant can not transform the non-final determination appealed from into a final determination by its apparently novel "commitment and undertaking" that it will not appeal to this Court

from the ultimate final determination. As we have noted, that ultimate determination will also involve a federal question with respect to the allocation formula, and the "commitment and undertaking" does not prevent the appellant from having that question reviewed by the New York Courts. Moreover, after such a review the appellee herein, should the determination therein be adverse to him, may be able to bring the matter to this Court. Thus there is a federal question which may be presented to this Court which is not now ripe for adjudication.

It may be observed that what the appellant has attempted to do by its "commitment and undertaking" is different from the stipulation for judgment absolute under Section 588, subdivision 3, of the New York Civil Practice Act. Upon an affirmance after such a stipulation, the Court must render judgment or order absolute against the appellant. (COHEN & KARGER, *Powers of the New York Court of Appeals*, §69, p. 303).

In conclusion it should be noted that the case of *Gerosa* v. *United Piece Dye Works* (Docket No. 461) is not, as appellant asserts, a companion case. It is simply another case arising under the same tax law and involving another aspect of the application of the Commerce Clause.

We respectfully submit, therefore, that the appellant has appealed from a determination which is not final and that the appeal should be dismissed.

Dated: New York, N. Y., December 17, 1954.

ADRIAN P. BURKE,
STANLEY BUCHSBAUM,
Counsel for Appellee.

No. 473. GULF OIL CORP. *v.* JOSEPH, COMPTROLLER OF THE CITY OF NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Matthew S. Gibson* for appellant. *Stanley Buchsbaum* for appellee. Reported below: 307 N. Y. 342, 121 N. E. 360.

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